

No. 17051

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH ETTA WITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty of illegal importation of narcotics in violation of Title 21, United States Code, Section 174. The violation occurred in San Diego County, State of California, and within the Southern Division of the Southern District of California. The jurisdiction of the District Court was based upon Title 18, United States Code, Section 3231.

This Court has jurisdiction to entertain this appeal and to review the judgment of the District Court under Section 1291 and 1294(1) of Title 28, United States Code.

II.

STATEMENT OF FACTS.

At approximately 9:00 P.M., December 26, 1959, a "lookout list" was posted at the Port of Entry, San Diego (San Ysidro), California, for the use and information of the Customs Inspectors on duty inspecting vehicular traffic entering the United States from Tijuana, Baja California, Mexico. This list included a description of an automobile by make, year, color, and California vehicle registration number. The list further indicated that one or two Negro women would be in the vehicle and that the Customs Inspectors at the border should search the vehicle and its occupants for narcotics. [Transcript of Record, p. 35.]

Fifteen minutes later, Customs Inspector Rudolph L. Dale stopped the described vehicle as it entered the United States through the Port of Entry. Appellant was a passenger therein; the driver was a male companion, Charles Anderson. Upon inquiry by Dale, appellant and her companion claimed United States citizenship and denied that they had any property to declare. [T. R. pp. 35-36.]

Inspector Dale's suspicion was aroused by his interview with the appellant and her companion in the light of the recently posted "lookout list". For the purpose of conducting a thorough search of the vehicle and its occupants for the presence of narcotic drugs, he moved the automobile to the secondary inspection area and had the occupants enter the Customs Agency Service office

in the Customs House at the Port of Entry for interrogation and search. [T. R. p. 36.]

Customs Inspectress Annetta W. Lohman was summoned to the office to supervise the search of the appellant in a private room. She requested the appellant to remove her clothes. Appellant inquired whether this was necessary and Mrs. Lohman replied that it was. Appellant proceeded to remove her clothing without any further recalcitrance. When Mrs. Lohman inspected the clothing which appellant had removed, she found that appellant had secreted in her brassiere three rubber condoms containing heroin. [T. R. p. 37.]

As a result of this discovery, Mrs. Lohman inspected appellant's person, but discovered no further contraband. [T. R. p. 38.] No physical force was employed at any time in conducting the personal search. [R. T. pp. 78 and 134.]

Inspector Dale conducted a similar search of Mr. Anderson's clothes and person in another search room. No contraband was found. Negative results also obtained from Inspector Dale's search of the automobile. [R. T. pp. 64-65.]

Following the discovery of the heroin secreted in appellant's brassiere, Customs Agents Walter A. Gates and John Maxcy questioned appellant concerning her trip to Mexico. Appellant denied knowing that the condoms contained heroin. [R. T. p. 93.] Thereafter they interrogated her companion, Mr. Anderson. [R. T. pp.

79-81.] He was asked if he would take a lie detector test and he replied that he would. [R. T. p. 89.] Appellant did not volunteer to submit to such a test. [R. T. p. 88.]

A second interview with appellant followed about forty-five minutes later. [R. T. p. 81.] On this occasion she told the Agents that she had been given the money to purchase the narcotics found in her brassiere by a man in Los Angeles known to her as "Bo". Pursuant to his instructions she had met a Mexican male in Tijuana on the night of December 26, 1959, delivered some money to him and received the narcotics. She was to deliver the contraband to Bo at the corner of Central and Vernon in Los Angeles for which she was to be paid \$100. [R. T. pp. 82, 87-88.]

At no time during the interviews with appellant on the evening in question did she state that the heroin had been carried by her in her coat pocket. [R. T. p. 97.]

Before crossing the border into the United States, appellant spent five minutes in a ladies' rest room in a service station on the Mexican side of the border. [R. T. pp. 135-136.]

Appellant had no objection to the instructions delivered by the District Court. [R. T. pp 141, 176.]

III.

CONSTITUTIONAL, STATUTORY, AND
REGULATORY PROVISIONS IN-
VOLVED.

The one count indictment was based upon Title 21, United States Code, Section 174, which provides in pertinent part as follows:

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . , contrary to law, . . . shall be imprisoned not less than 5 or more than 20 years. . . .

“Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

Title 19, United States Code, Section 482, provides as follows:

“Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wher-

ever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial."

Title 19, United States Code, Section 1581, provides in pertinent part as follows:

"(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under chapter 5 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, truck, package or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

Title 19, United States Code, Section 1582, provides as follows:

“The Secretary of the Treasury may prescribe the regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.”

Title 19, Code of Federal Regulations, Part 23, Customs Regulation of 1943, provides in pertinent part as follows:

“§23.1 . . . (a) For the purpose of examining the manifest or inspecting and searching the vessel or vehicle, any customs officer [footnote omitted] at any time may go on board of:

“(1) Any vessel at any place in the United States [footnote omitted];

“(2) Any American vessel on the high seas when there is probable cause to believe such vessel is violating or has violated the laws of the United States; or

“(3) Any vessel within a customs-enforcement area, [footnote omitted] but customs officers shall not board a foreign vessel upon the high seas in contravention of any treaty with a foreign govern-

ment, or in the absence of a special arrangement with the foreign government concerned. * * *

“(d) A customs officer may stop any vehicle arriving in the United States from a foreign country for the purpose of examining the manifest or inspecting and searching the vehicle and may stop, search, and examine any vehicle or person within the limits of the United States on which or on whom he may have reasonable cause to believe there is merchandise subject to duty or which has been introduced into the United States contrary to law.
* * *.”

Amendment 4 to the Constitution of the United States of America provides as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

IV.

ARGUMENT.

- A. Appellant, a Suspected Narcotics Smuggler Entering the United States From Mexico, Was Lawfully Searched at the Port of Entry by an Authorized Female Inspectress of the Bureau of Customs, and the Commercial Quantity of Heroin Discovered in Her Brassiere Was Properly Seized and Subsequently Received in Evidence.

The gist of Appellant's theory on her motion to suppress the seized heroin is that an international traveler entering the United States through a Port of Entry supervised by the Bureau of Customs of the Treasury Department may not be searched for contraband unless the Customs Inspectors have probable cause to believe that the entrant is concealing contraband. This is not the law and has never been the law since the adoption of the Constitution. It has always been understood that the sovereign had plenary power to control the introduction of contraband across its borders from abroad and to insure its physical security and protect its revenue by a thorough search of all persons and chattels entering the country.

In the Act of July 31, 1789, the First Congress sitting in its first session saw fit to recognize these principles in the earliest federal legislation:

"Sec. 24. *And be it further enacted*, That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to en-

ter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.”

1 Stat. 29 at p. 43 (1789).

It is significant that this first customs search and seizure statute, enacted 171 years ago, clearly distinguishes between searches of vessels and searches conducted generally within the nation. It is apparent, therefore, that the Congress which proposed the Fourth Amendment 54 days after the enactment of the foregoing statute recognized a warrant, secured from a justice of the peace upon an oath or affirmation setting out the officer's *cause to suspect*, was necessary to search inland for contraband which might have been smuggled into the country, but that no warrant was required for a search of a ship or vessel, which, presumably, would be at or beyond the borders of the United States.

1 Stat. 97 (1789) (the resolution which became the Fourth Amendment).

This case poses the rare instance of a fact situation the constitutional interpretation of which was authoritatively announced by the draftsmen of the very organic law in issue. Mr. Chief Justice Taft observed that:

“... The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”

Carroll v. United States, 267 U. S. 132, 149 (1924).

Thus, the right to conduct searches at the border without a warrant was recognized by the very Congress whose resolution of September 23, 1789, gave birth to the Bill of Rights which, according to appellant, invalidates the search procedure authorized on July 31, 1789.

This distinction between the search of a conveyance or traveler for contraband and the inland search of a dwelling or other structure has been perpetuated by Congress from 1789 to this day. The present statute was enacted on July 18, 1866. Mere suspicion of contraband is sufficient under that statute to justify the search of a traveler entering the United States.

14 Stat. 178, 19 U. S. C. Sec. 482, R. S. Sec. 3061 (1866);

13 Stat. 441 (1865);

3 Stat. 315 (1816);

3 Stat. 231 (1815);

1 Stat. 627, 677 (1799);

1 Stat. 305, 315 (1793);

1 Stat. 145, 170 (1790).

Apparently, the 1815 enactment, *supra*, was the first extension of the border search principle beyond water craft to land conveyances, beasts of burden, and people. It is understandable that as land commerce with other nations on the North American continent developed, Congress saw the need to extend the search power of revenue enforcement officers to the newer modes of smuggling. That statute is the model for the present statute which authorizes the search of vehicles and persons for contraband.

What is particularly noteworthy in the 1815 enactment is the fact that Congress did not restrict the power to search persons and chattels entering the country to cases where probable cause obtained.

The power to search them was plenary if the officer merely *suspected* the presence of contraband. Reasonable cause only became necessary if merchandise was found as a result of the border search. Then, seizure of such merchandise was authorized if there were probable cause to believe that the merchandise found pursuant to the search had been imported without the payment of a duty for which it was liable or in some other unlawful manner. Probable cause was a prerequisite to the *seizure* of the merchandise, but not to the search at the border which caused its discovery.

We submit that the discovery at the Port of Entry of three rubber condoms in the brassiere of a woman who had just entered the United States from Tijuana, Mexico, and the further discovery that such condoms contained a white powder resembling heroin did constitute probable cause to conclude that appellant was in the process of smuggling narcotic drugs into the United States. This conclusion is reinforced by the prevalency

of narcotics smuggling from Mexico into the United States through the San Diego (San Ysidro) Port of Entry, the fact of which this Court has previously taken judicial notice.

Blackford v. United States, 247 F. 2d 745, 752 (9 Cir. 1957), cert. den. 356 U. S. 914;

Cf. Carroll v. United States, 267 U. S. 132, 159-160 (1924).

The 1815 statute which expressly treats the problem of the traveler and the land conveyance for the first time clearly expressed the dichotomy between people and chattels in transit and other subjects of a customs search:

“ . . . And if any of the said officers of the customs shall suspect that any goods, wares, or merchandise, which are subject to duty, or shall have been introduced into the United States contrary to law, are concealed in any particular dwelling-house, store, or other building, he shall, upon proper application, on oath, to any judge or justice of the peace, be entitled to a warrant, directed to such officer, who is hereby authorized to serve the same, to enter such house, store, or other building, in the day time only, and there to search and examine whether there are any goods, wares, or merchandise, which are subject to duty, or have been unlawfully imported; and if, on such search or examination, any such goods, wares, or merchandise, shall be found, which there shall be probable cause for the officer making such search or examination, to believe are subject to duty, or have been unlawfully introduced into the United States, he shall seize and secure the same for trial; *Provided*

always, That the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, or to packages on any animal or animals or carried by man on foot."

3 Stat. 231, 232 (1815).

The distinction expressed in this 1815 statute cannot be questioned as an unreasonable legislative solution to the problem of protecting the economy and external revenue of the United States while aiding in the physical security of the nation. If it was a reasonable enactment at the close of the War of 1812, it is more clearly proper today after two world wars when millions of persons each year travel to and fro over the borders of the United States to all parts of the world. So well settled is the prerogative of a nation to require full disclosure of all merchandise and articles imported by a traveler at its borders that our research fails to uncover a single federal case in which a traveler has contended as this appellant that a personal search *at the border* may be made only by inspectors having probable cause to conclude that the traveler is a smuggler. In the recent cases concerning the border search, the right to search has been conceded and issue is taken with the reasonableness of the *extent* of the search after the presence of contraband in the traveler is discovered, or with the geographic scope of the border search power.

Murgia v. United States, No. 16811, 9 Cir. (Presently before this Court). (Customs arrest beyond the property of the Customs House);

Blackford v. United States, 247 F. 2d 745 (9 Cir. 1957), cert. den. 356 U. S. 914, (Search at the Port of Entry; probable cause conceded);

King v. United States, 258 F. 2d 754 (5 Cir. 1958), cert. den. 359 U. S. 939 (Search at the Port of Entry; probable cause conceded);

United States v. Yee Ngee How, 105 F. Supp. 517 (N. D. Cal. 1952) (Second search of ship's crewman on the pier held reasonable).

The customs power to search for contraband at the border without probable cause has been upheld even in a case where a vessel was merely sailing in a coastal bay with no evidence of international entry.

“ . . . A search of a vessel by officers of the Coast Guard or of the customs for the purpose of discovering a cargo which might be subject to duty should not be regarded as unreasonable even though the search, as distinguished from the seizure, is made without probable cause . . . ”

The Atlantic, 68 F. 2d 8, 10 (2 Cir. 1933).

Even the otherwise privileged mails do not escape the scrutiny of the customs inspector:

“ . . . The revenue laws of the United States require that every owner or consignee of property imported from other countries shall report the same to the customs officers before it is landed from the vessel, and shall furnish an invoice of its character and purchase price, for valuation, or that it may be seen if it is duty free, and all the vexations and annoying machinery of the custom-house, and the vigilance of its officers, are imposed by

law to prevent the smallest evasion of this principle.

“Of what avail would it be that every passenger, citizen and foreigner, without distinction of country or sex, is compelled to sign a declaration before landing, either that his trunks and satchels **in hand** contain nothing liable to duty, or if they do, to state what it is, *and even the person may be subjected to a rigid examination*, if the mail is to be left unwatched, and all its sealed contents, even after delivery to the person to whom addressed, are to be exempt from seizure, though laces, jewels, and other dutiable matter of great value may thus be introduced from foreign countries.”

Cotzhausen v. Nazro, 107 U. S. 215, 218 (188). (Emphasis added.)

In the foregoing holding the Supreme Court indicated that it was the view of the 1882 Court that the personal search at the customs house was an accepted practice in the enforcement of the customs laws.

Elsewhere the Supreme Court has recognized the distinction between the plenary power to search at the border and the more circumscribed search power under all other circumstances, the distinction completely ignored by appellant's brief:

“. . . The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things

differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. . . ."

Boyd v. United States, 116 U. S. 616, 623 (1885).

In a similar vein are the observations by Mr. Chief Justice Taft thirty-nine years later in the *Carroll* case, *supra*. He was called upon to determine the degree of probable cause necessary to authorize prohibition agents to stop and search an automobile within the United States. He considered the customs power to search at the border so clearly settled that he used it as a polar standard against which to test the case before him:

"... It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the

highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise . . .”

Carroll v. United States, supra, at pages 153-154.

Appellant misreads the significance of the *Blackford* case *supra*. She quotes a portion of that decision at page 34 of her *Opening Brief* and implies without explanation that her position is supported thereby. That quotation, taken in the light of the foregoing cases, demonstrates that appellant's position is wholly without merit. This Court observed in that passage that the Fourth Amendment made no distinction between the protection of property and the protection of persons: Both were constitutionally protected from unreasonable search and seizure. It would appear to be a corollary of that proposition that the Fourth Amendment affords no greater protection to appellant when she smuggles heroin in her brassiere than when she surreptitiously imports it in her handbag.

The heart of the matter is that appellant voluntarily subjected herself to the vexation of the search which was her undoing by traveling to Mexico. She was not rudely awakened in her home in the dark of night by

the secret police; she was aware that her belongings might be searched upon re-entry. She left the United States and, by her conduct while in Mexico and as she re-entered the country, she raised a suspicion in the mind of the customs inspector that she was smuggling contraband into the United States. Unlike *Blackford, supra*, no attempt was made to remove any contraband from the interior of her body, since she had secreted the heroin in her clothing. Nor was any emetic given to her, since she had swallowed no contraband as *King, supra*. She does not even assert that any force was used at any time during the search. She removed her own clothing. Her sense of shame should not have been unduly aroused by the female inspector specially employed to supervise the search of suspected female smugglers. Appellant cites not one authority which even suggests that such conduct by the Bureau of Customs is unlawful, no less in contravention of the Fourth Amendment.

The pertinent law was well summarized several years ago by Judge Oliver Carter as follows:

"If a search is valid there is nothing in the Fourth Amendment which inhibits the seizure by law enforcement agents of property, the possession of which is a crime, even though the officers are not aware that such property is on the person when the search is initiated . . ."

* * *

"Searches of persons coming into the United States from a foreign country are in a specialized category, readily distinguishable from such searches generally . . ."

* * * * *

“Neither a warrant nor an arrest is needed to search in these circumstances; and the search which customs officials are authorized to conduct upon entry is of the broadest possible character . . . That all persons entering the United States from outside might be searched without the necessity of probable cause was recognized in *Carroll v. United States, supra* . . .”

United States v. Yee Ngee How, supra, at pp. 519-520;

Cf. Bolger v. United States, D. C. S. D. N. Y. Nov. 16, 1960, per Frederick V. P. Bryan, J.

The significance of appellant's contention should be clearly recognized. Her contention is that without probable cause no persons can be searched by the Bureau of Customs when they enter the United States from abroad. If she were to persuade this Court of such a novel doctrine, the United States would at once be rendered helpless to protect itself from narcotics importers, smugglers of the entire spectrum of mercantile contraband, and saboteurs. Only in that rare case where customs agents or an informant had obtained probable cause in a foreign country in advance of the traveler's entry into the United States could a search be made. Appellant advances no distinction between the clothing on the traveler and the belongings in his valise; thus, no search whatsoever could be made under her theory except in that rare case of advance information. No longer would there be a need for the trained customs inspector experienced in observing the self conscious gesture evidencing the nervous smuggler, since his professional intuition would not authorize the search practiced by such inspectors since the inception of the Bill of Rights. Such

consequences should not be lightly risked even aside from the presumption of validity of long-standing legislation claimed to be repugnant to the Constitution. However, appellant's theory is even more ambitious. She is attempting to invalidate not merely 171 years of legislation, she is attacking the propriety of the actual day-to-day practices of customs inspectors who have been following these heretofore unchallenged laws throughout the existence of this country.

Our research has uncovered the regulations prescribed by the Secretary of the Treasury pursuant to the customs laws for the guidance of the customs inspectors as far back as 1874. In that year the Secretary of the Treasury issued a volume of regulations for the use of the customs inspectors so that they would know their duties under the customs laws as well as the policy of the Treasury Department concerning their application. Articles 838 and 839 restated the search and arrest powers conferred upon officers of customs by statute.

General Regulations Under the Customs and Navigation Laws of the United States (Wash., Gov't Printing Office, 1874).

The Secretary recognized the unusual powers contemplated by the customs and navigation laws and saw fit formally to caution his inspectors that a policy of restraint must be followed in their duties:

“Art. 841. The severity and extent of the provisions for the seizure and examination of books, papers, and accounts, are such that extreme caution, discretion, and forbearance are requisite in their enforcement and exercise. They are not to be put in operation upon hasty or trivial charges nor ever used in full force, except when absolutely

necessary in extreme cases. Officers are cautioned that such extensive powers are to be strictly construed; that an exact observance of every form of law, to the most minute particular, is indispensable, and that the arbitrary and unnecessary use of these powers is strictly forbidden, and may subject the offender to an action at common law for damages sustained by the aggrieved party."

Thus, at least 86 years ago the enforcement agency had recognized the breadth of its search and seizure power, that the powers surpassed those of other law enforcement officers and should be exercised sparingly and with tact. The continued adherence to this conservative attitude probably explains the dearth of cases alleging unreasonable search of persons entering the United States.

In 1884 regulations identical to the foregoing were published by the Secretary. In 1892 the regulations expanded upon the problem of inconvenience to the traveler as follows:

"Art. 353 . . .g. The examination of passengers' baggage at the wharves entails unavoidable inconvenience and discomfort to the passengers. Officers employed upon this service must observe strict courtesy and decorum in their proceedings. . . . Customs officers assigned to baggage examinations will be held amenable to discipline for any violation of these rules."

**Customs Regulations of the United States Prescribed for
the Instruction and Guidance of Officers of Customs
(Wash., Gov't Printing Office, 1892).**

That all articles were subject to search upon entry is not left in doubt by the 1892 Regulations since they contemplated a general search of all incoming belongings:

“Art. 355. At the larger ports, customs officers will be detailed to furnish to passengers the necessary blanks and instruct them in regard to declaring the contents of their packages. Inspectors duly designated will verify such declarations by an examination of the baggage as soon as landed, and dutiable articles found therein must be submitted by them to the appraiser, or officer acting as such, for appraisement, and duty found due thereon shall be assessed and collected by the collector and the articles delivered to their owner. No baggage shall be examined until the passenger has made the declaration required by law, nor can such declaration be amended or changed. Should such duties not be paid, the dutiable merchandise will be treated as unclaimed. No seizure shall be made in the absence of clear evidence of fraudulent intent. Baggage shall be examined on the deck or wharf, and not in a cabin or state-room.”

* * *

“Art. 357. The examination of passengers’ baggage by the officers assigned to that duty must be strictly enforced, but care must be taken that the scrutiny be conducted with decency and proprie-

ty. Any examining officer guilty of intentional rudeness or disrespect toward a passenger must be reported to the collector for discipline."

* * *

"Art. 360. All baggage of passengers from contiguous foreign territory shall be examined by an inspector at the port of first arrival, and, if dutiable goods are found contained therein, the amount of duties shall be assessed and collected. If a passenger refuses to open the trunks or other envelopes containing his baggage, or to deliver the keys, the inspector shall open the baggage, and, if dutiable articles are found therein, the trunks or envelopes, with their contents, shall be forfeited."

* * *

"Art. 1063. Inspectors on the frontier will exercise diligence to prevent smuggling in or by boats, carriages, or by persons arriving from adjacent foreign territory; they will not permit boats or vehicles to avoid the required report and inspection at the nearest customs stations within the United States.
. . ."

The 1892 Regulations allude to the problem of searching female travelers:

"Art. 1067. Upon the arrival of a steamship from a foreign port, notice will be sent to the female inspectors to attend at the place where the baggage of the passengers of the steamer is to be landed, and upon receiving such notice they will report without delay to the deputy surveyor, or the officer of the vessel, and there remain until relieved from further attendance. They are required

to keep themselves informed of the time when steamers are expected, so that upon receipt of notice thereof they may be ready to report for duty in proper time. All merchandise, or articles subject to duty which are seized by them, must be sent to the seizure room, and reports made thereof."

Customs Regulations of the United States Prescribed for the Instruction and Guidance of Officers of Customs (Wash., Gov't Printing Office, 1892).

The 1900 Regulations republished the substance of the foregoing 1892 Regulations in Arts. 585, 588, 592 and 1632. In the 1908 Regulations the full statutory power to search travelers on the basis of the suspicion of concealing contraband was spelled out by the Secretary as follows:

"Art. 1423 . . .

"(Customs officers) . . . are authorized to stop, search, and examine any vehicle, beast, or person on which or whom they may suspect there is merchandise unlawfully introduced into the United States. If such goods are found, they will seize the vehicle, beast, and all packages, arrest the person or persons, and report the facts to the collector.

"They are authorized, if necessary, to enter upon or pass through the lands, inclosures, or buildings other than the dwelling house of any person, at all times, either night or day."

Customs Regulations of the United States Prescribed for the Instruction and Guidance of Customs Officers (Wash., Gov't Printing Office, 1908).

With the arrival of World War I, the 1915 Regulations were less covertly worded than the regulations of the Victorian era concerning the function of female in-

spectresses, the existence of whom had been recognized in the 1892 Regulations:

“Art. 1088. Inspectresses.—Female inspectors are employed for the examination and search of persons of their own sex arriving from foreign countries, and upon the arrival of a steamship from a foreign port notice will be sent to such female inspectors to attend at the place where the baggage of the passengers is to be landed, and they will report without delay to the deputy surveyors or the officer in charge of the vessel, and there remain until relieved from further attendance.”

Customs Regulations of the United States Prescribed for the Instruction and Guidance of Customs Officers (Wash., Gov't Printing Office, 1915).

The 1924 Regulations continued in similar form the growing literature of search procedure. By 1932, the Secretary of the Treasury determined that the following brief regulation was sufficient to treat the day-to-day practice of searching suspected female smugglers entering the United States:

“Art. 1338. Inspectresses.—Female inspectors are employed for the examination and search of persons of their own sex arriving from foreign countries.”

Customs Regulations of the United States Prescribed for the Instruction and Guidance of Customs Officers (Wash., Gov't Printing Office, 1932).

In 1937 the Secretary issued a new set of regulations which substantially restated the foregoing regulations. The present regulations of the Bureau of Customs, which are published in Title 19 of the Code of Federal Regulations, are the Customs Regulations of 1943.

The foregoing canvass of customs regulations since 1874 has been presented so that the Court may consider not merely the reasonableness of the customs search statutes but also the reasonableness of the administrative interpretation given to these laws by the agency charged with their enforcement since 1789. While we submit that the Government could properly insist that every traveler, or every tenth traveler, entering the United States submit to a search of his person as well as a search of his baggage, it has not been the practice of the Bureau of Customs to engage in such intensive search procedures, partly because of the public annoyance which this practice would produce and partly because of the prohibitive cost which it would entail. Instead the regulations promulgated pursuant to statute and the training manual published by the Secretary of the Treasury have consistently followed a restrained view of the search power, requiring *grave suspicion* before extending the search of a traveler's baggage to a search of the traveler's person:

"Sec. 193. Instructions Generally.—Inspectors shall closely scrutinize the person and observe the actions of all passengers. When there is suspicion that an attempt is being made to violate the customs or immigration laws, a report shall be made immediately to the officer in charge.

"A passenger shall not be subjected to a personal search except when there is grave suspicion, and not until all the facts have been submitted by the inspector to the officer in charge for his approval of the proposed action. When a personal search is ordered, another inspector, if available, shall be designated to assist. Arrangements may be made with

the purser of the vessel to assign a room for the purpose. The passenger shall be instructed to remove his clothing, one piece at a time. Each piece shall be thoroughly searched and the contents placed on a table in full view of the passenger. All bills, price tags, and other pertinent articles shall be segregated and detained. At the conclusion of the search, the inspector shall notify the officer in charge of the results and shall be guided by his decision. If articles are retained by the inspector for further action they shall be marked for identification in the presence of the passenger. The declaration shall be endorsed to show the action taken."

Manual for the Guidance of Customs Inspectors, Treasury Department, Bureau of Customs (Wash., Gov't Printing Office, 1946).

We cannot stress too vigorously the importance of the issue raised so blithely without reason or authority by appellant. If she should prevail, no simple revision of administrative regulations could reestablish the border security of the nation. It is the constitutional validity of the ancient customs search statutes which are brought in issue by this appeal. Thus, only by amending the Fourth Amendment to the Constitution to recognize *expressly* the border search power of the Bureau of Customs, *implicitly* recognized therein since 1789, could we cure the injury to the physical security and revenue of the United States that would result from a reversal of the judgment below by this Court.

Indeed the unreasonableness of appellant's position becomes patent when the facts of her narcotics smuggling are considered in the light of her legal contention. Judge

James M. Carter, below, described the situation quite forcefully as follows:

“The Court: If we had no way of controlling this border, how could you stop the flow of narcotics into this country? If what you say were the law, we might as well discharge the Customs officers and say, ‘Go to it boys, you can bring narcotics across the border because the Customs Officers can’t search your person as long as you have a clean collar on and don’t stutter when asked what your citizenship is, as long as there is no informer. Bring it across and let’s have a nice game of hide-and-seek after you bring it into the country to try to find it.’ I can’t conceive that that is the law. I can’t conceive that a country doesn’t have the right to protect itself from violations occurring at the border. This would go to the internal security of the country. Today we talk about heroin. Tomorrow you can talk about the spy, about the espionage agent, the man bringing secret messages across. Has this country no power to protect itself? This startles me.” [R. T. pp. 28-29.]

The distinguishing factor between the cases cited by appellant and the instant one is that they do not concern a search at the border, with the single exception of the *Blackford* case, *supra*; that case concerns not the power to search without probable cause, but the *extent* of a personal search into the interior of the body, the existence of probable cause to search being virtually conceded.

The *Johnson* case concerned a search of a dwelling conducted by the Federal Bureau of Narcotics and the

Seattle Police Department without a warrant. No border search question was involved.

Johnson v. United States, 333 U. S. 10, 13-14 (1948).

The *Miller* case concerned a search of a dwelling conducted by the Federal Bureau of Narcotics and the District of Columbia Police Department without a warrant. No border search question was involved.

Miller v. United States, 357 U. S. 301 (1958).

The *Clay* case was an arrest and search conducted by Intelligence Agents of the Internal Revenue Service investigating evasion of the Federal Wagering Tax. No border search question was involved.

Clay v. United States, 239 F. 2d 196 (5 Cir. 1956).

The *Wrightson* case was a search of a dwelling incident to the arrest of an armed robber by the District of Columbia Police Department. No border search question was involved.

Wrightson v. United States, 222 F. 2d 556 (D. C. Cir. 1955).

The *Walker* case concerned the arrest of a narcotics peddler based upon an informant's tip corroborated by police records. No border search question was involved.

United States v. Walker, 246 F. 2d 519 (7 Cir. 1957).

The *Contee* case was a search of the defendant's dwelling without a warrant pursuant to the investigation of an armed robbery by the District of Columbia Police Department. No border search question was involved.

Contee v. United States, 215 F. 2d 324 (D. C. Cir. 1954).

The *Draper* case was an arrest of a narcotics peddler by the Federal Bureau of Narcotics based upon probable cause. No border search question was involved in the arrest which occurred in the Denver Union Station.

Draper v. United States, 358 U. S. 307, (1959),
Affirming 248 F. 2d 295 (10 Cir. 1957), af-
firming 146 F. Supp. 689 (D. Colo. 1956).

Finally, appellant's citation of the recent *Henry* case lends no support to her position, since that case concerned an arrest and search of an automobile by the Federal Bureau of Investigation in Chicago, Illinois, during the investigation of a case concerning the theft of property stolen from interstate commerce. No border search question was involved.

Henry v. United States, 361 U. S. 98 (1959).

Although this case appears to be the first one in which this Court has been called upon to determine whether probable cause is necessary for a border search, its opinion in the first *Cervantes* case indicated by way of clear dictum how this case should be decided:

"An authorized federal border official may, upon unsupported suspicion, stop and search persons and their vehicles entering this country. 19 U. S. C. §482. *Carroll v. United States* . . . But after entry has been completed a search and seizure can be made only on a showing of probable cause. *Landau v. United States*, 2 Cir., 82 F. 2d 285, 286; *United States v. Yee Ngee How*, D. C., 105 F. Supp. 517, 523 . . ."

Cervantes v. United States, 263 F. 2d 800, at
footnote 5, p. 803 (9 Cir. 1959).

In the *Landau* case, *supra*, the Second Circuit observed:

“As early as 1799, the baggage of one entering the country was subject to inspection (1 Stat. 662). The necessity of enforcing the customs laws has always restricted the rights of privacy of those engaged in crossing the international boundary . . . [citing *Carroll v. United States*, *supra*]. Neither a warrant nor an arrest is needed to authorize a search in these circumstances. In the instant case, there was no disturbance of the appellant, his residence, or his effects after a completed entry. It was to these evils that the Fourth Amendment was directed . . . [citing *Boyd v. United States*, *supra*]. It has been said: ‘Whatever the causistry of border cases, it is broadly a totally different thing to search a man’s pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.’ See *United States v. Kirschenblatt*, 16 F. 2d 202, 203 . . . (C. C. A. 2) . . .”

Landau v. United States Attorney, 82 F. 2d 285, 286 (2 Cir. 1936), cert. den. 298 U. S. 665.

We further submit that in deciding the *Blackford* case, *supra*, this Court was necessarily concluding that the search procedure followed in this case was proper. It would appear from the opinion in that case that the Court was of the view that probable cause to search Blackford’s rectum did not obtain until after he was disrobed and the inspector discerned the greasy foreign substance in the vicinity of his rectum. The Court held:

“ . . . The customs officer did not exceed his authority in detaining appellant nor by asking him to remove his coat . . . ”

Blackford v. United States, supra, at page 749.

At this point, the customs officer was acting upon uncorroborated suspicion.

When Blackford's coat was removed his bare arms revealed the tell-tale needle marks of a narcotics addict. When appellant's brassiere was removed her cache of heroin was revealed. Once the condoms of heroin were discovered by the Customs Inspectress, it cannot be doubted that she had probable cause to believe that appellant was smuggling an illegal substance into the United States from Mexico. Thus her seizure of that evidence was clearly valid. Does the validity of the search which uncovered this evidence turn on the fact that it was secreteed in an undergarment rather than, as with Blackford, hidden merely by the sleeve of his coat? Such a distinction would be whimsical.

Appellant chose to secrete heroin in her clothing immediately before she entered the country. She was given an opportunity to avoid commission of the crime of narcotics smuggling when she was asked by the Customs Inspector at the border if she had anything to declare. She rejected that opportunity. She has no complaint now that the Bureau of Customs officials performed their duty with dignity and decorum and frustrated her clandestine activities. The search of her clothing was a proper exercise of the historic, and heretofore unchallenged, border search power and the seized heroin was properly admitted into evidence at the trial.

B. The Evidence of Guilt Was More Than Sufficient to Justify the Conviction.

It would be hard to conceive of a smuggling case with more conclusive evidence of guilt, absent a judicial confession by the appellant under cross-examination. Disregarding for the moment the rule that on appeal the evidence should be considered in the light most favorable to the Government, even *appellant's* version of the facts is not consistent with her plea of not guilty.

Ignoring the fact that the heroin was found in appellant's brassiere by the Customs Inspectress, appellant contends that she was an innocent traveler transporting across the international border in her coat pocket a soft packet wrapped in a napkin, as an accommodation to a Mexican friend. Her story is that she expected to carry the packet just a few blocks, from one side of the border to the other and to deliver it to a man she did not know. She had no cogent explanation for not suspecting that contraband was in the packet. She assumed that her Mexican friend could not legally cross the border and deliver the packet himself. [R. T. pp. 129-135.]

However, the jury verdict indicates that the appellant's incredible explanation of her delivery service was not accepted by the trier of fact. The very location of the contraband on her person indicates that appellant had guilty knowledge that she was importing contraband. Just before crossing the border, appellant admitted, she stopped in the ladies' rest room of a service station in Mexico. The jury might well have inferred that she took this opportunity to secrete the three condoms of heroin in her brassiere in order to avoid detection at the Customs House. She denied having anything to declare when stopped by the Customs Inspector at the bor-

der. After the heroin had been discovered in her brassiere, appellant admitted that she was to receive \$100 for delivering the contraband to "Bo" at Vernon and Central Avenues in Los Angeles.

It thus appears that the Government required no rebuttable presumption of guilty knowledge to establish criminal intent. In any event, appellant made no objection to any of the jury instructions. So far as this case is concerned, had she made a timely objection, the district court might well have determined that the facts did not require a reading of the statutory presumption complained of by appellant, since the circumstantial evidence of criminal intent was so clear.

C. No Constitutional Right of Appellant Was Violated by the Failure of the District Court to Impose a Term of Probation Upon Her Rather Than Five Years in the Custody of the Attorney General.

Appellant's final point is utterly frivolous. She does not contend that the term of her commitment, the minimum provided by law, was illegal. Nor does she assert that the law under which she was sentenced was invalid. Yet she contends that *something* is illegal. It is not clear to us exactly where the illegality or inequity of which she complains can be found. There were no co-defendants in this case as in *Marcella v. United States*, No. 16910, which she cites. Thus, no decision on comparative culpability had to be made by the Government with respect to this case. There was only one count in the Indictment and only one defendant. The jury found her guilty of narcotics smuggling on overwhelming evidence.

Certainly the foregoing facts are not apposite to those of *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), upon which appellant relies. That case was a challenge under the equal protection clause of the Fourteenth Amendment to the systematic discrimination against Orientals in the administration of a San Francisco municipal ordinance concerning the operation of laundries. Here we are concerned with the sentencing of a person properly convicted of a federal crime. Nothing appears in the record of this case, nor can this Court take judicial notice of any facts suggesting that an "evil eye" or an "unequal hand" have been employed by the Government in the enforcement of the federal narcotics laws.

Saunders v. Lowry, 58 F. 2d 159 (5 Cir. 1932).

However, the question of the availability of probation after conviction under 21 U. S. C. Sec. 174 can be of only academic interest to appellant, since the record does not indicate that the District Court was of a mind to grant probation to her assuming, *arguendo*, it had the power to do so. Quite the contrary, the sentencing judge seems to have been of the opinion that the commercial quantity of heroin smuggled by appellant justified a term of commitment:

"The Court: I have considered what you suggest in other cases, some of which I think have been more compelling than this, as far as my compassion on the particular defendant is concerned, but I have concluded that while there may be some question as to the validity of the law, I am inclined to believe that Congress does have the power, and more particularly, I believe that the court should be extremely cautious in attempting to amend laws by judicial decree, when the proper body to enact laws and to

make amendments of the statute, if any should be made, is the Congress. Therefore, the court would not attempt to place this defendant on probation in view of the statute in its present terms." [R. T. pp. 198-199.]

We submit that a legal sentence was imposed upon appellant and she cannot complain that the district court did not impose upon her a sentence, which even by her theory is discretionary with the court, and which the district court indicated it was not disposed to impose in any event.

Brown v. United States, 222 F. 2d 293, 298 (9 Cir. 1955).

V.

Conclusion.

For the reasons stated the judgment of the district court should be affirmed.

Respectfully submitted,

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